STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0466

Energy Policy Advocates,
Appellant,

vs.

Keith Ellison, in his official capacity as Attorney General, et al.,
Respondents.

Filed May 8, 2023
Affirmed
Smith, Tracy M., Judge

Ramsey County District Court
File No. 62-CV-20-3985

Douglas P. Seaton, James V. F. Dickey, Upper Midwest Law Center, Golden Valley, Minnesota (for appellant)

Keith Ellison, Attorney General, Michael D. McSherry, Oliver J. Larson, Assistant Attorneys General, St. Paul, Minnesota (for respondents)

Considered and decided by Cochran, Presiding Judge; Worke, Judge; and Smith, Tracy M., Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

Appellant Energy Policy Advocates challenges the district court's determination that respondents Attorney General Keith Ellison and the Office of the Attorney General (together, the Attorney General) properly withheld three emails following Energy Policy's data request under the Minnesota Government Data Practices Act. We affirm.

FACTS

This case considers whether the Attorney General has an obligation to disclose three emails to Energy Policy under the Minnesota Government Data Practices Act (MGDPA), Minnesota Statutes sections 13.01 through 13.90 (2022).

Energy Policy submitted data requests to the Attorney General related to special assistant attorneys general in the Office of the Attorney General whose salaries are funded, pursuant to employee secondment agreements, by the State Energy and Environmental Impact Center at New York University School of Law. The Attorney General provided some data but declined to disclose other responsive data, citing Minnesota Statutes section 13.39, which classifies active civil investigative data as not public, and section 13.393, which exempts certain attorney data from the MGDPA. Energy Policy sued the Attorney General under Minnesota Statutes section 13.08, seeking an order to disclose the data.

Following discovery and the Attorney General's disclosure of some additional documents, Energy Policy and the Attorney General narrowed the data at issue to four responsive emails. The emails had been sent to the Attorney General from other state attorney general offices in connection with their work as a multistate coalition of attorneys general coordinating legal challenges to address climate change. The attorneys general had entered into a common-interest agreement to protect the confidentiality of information shared among them as part of that project.

The parties agreed that the matter would be determined by motion practice and the district court's in camera review of the unredacted emails, and the Attorney General

provided Energy Policy with partially redacted copies of the four emails and the common-interest agreement. The Attorney General requested that the district court determine that it appropriately classified the documents as not public, and Energy Policy moved to compel disclosure of the unredacted emails as improperly withheld public data. In the alternative, Energy Policy argued that the data—even if not public—should be disclosed under Minnesota Statutes section 13.39, subdivision 2a, which provides that the district court may order the disclosure of active civil investigative data after conducting an in camera review and considering the benefits and harms of such disclosure.

The district court granted in part and denied in part Energy Policy's motion to compel. The district court determined that all four emails were active civil investigative data under Minnesota Statutes section 13.39, subdivision 2, and thus not public. Then, considering the benefits and harms of disclosure under Minnesota Statutes section 13.39, subdivision 2a, the district court ordered the Attorney General to disclose one email and denied Energy Policy's motion as to the other three. The district court also determined that those three emails were properly withheld under Minnesota Statutes section 13.393 because they contained attorney work product and that protection had not been waived.

Energy Policy appealed. We granted Energy Policy and the Attorney General's joint motion to stay the appeal pending a decision from the Minnesota Supreme Court in *Energy Policy Advocates v. Ellison*, A20-1344. We dissolved the stay after the supreme court decided *Energy Policy Advocates v. Ellison*, 980 N.W.2d 146 (Minn. 2022).

DECISION

The MGDPA "establishes a presumption that government data are public and are accessible by the public for both inspection and copying unless there is federal law, a state statute, or a temporary classification of data that provides that certain data are not public." Minn. Stat. § 13.01, subd. 3; *see also* Minn. Stat. § 13.03, subd. 1.

The district court determined that the Attorney General did not have to disclose the emails under two provisions of the MGDPA. First, it determined that, under Minnesota Statutes section 13.39, the emails were not public and the harm of disclosure outweighed the benefits to the public and Energy Policy. Second, it determined that, under section 13.393, the emails contained attorney work product and thus were exempt from disclosure under the MGDPA. Energy Policy challenges both determinations. Because we conclude that the Attorney General's obligation to disclose the emails is resolved by section 13.39, our review begins and ends with the district court's analysis under that provision.

Under Minnesota Statutes section 13.39, active civil investigative data are not public.

> *[D]ata collected* by a government entity *as part of an active investigation undertaken for the purpose of the commencement or defense of a pending civil legal action*, or which are *retained in anticipation of a pending civil legal action*, are classified as protected nonpublic data pursuant to section 13.02, subdivision 13, in the case of data not on individuals and confidential pursuant to section 13.02, subdivision 3, in the case of data on individuals.

Minn. Stat. § 13.39, subd. 2(a) (emphasis added). Whether a civil legal action is pending is determined by "the chief attorney acting for the government entity." *Id.*, subd. 1.

Even though active civil investigative data are not public, a requester may obtain such data by bringing an action in district court. *Id.*, subd. 2a. The district court must examine the disputed data in camera and may order some or all of the data to be released. *Id.* In making its determination, "the court shall consider whether the benefit to the person bringing the action or to the public outweighs any harm to the public, the government entity, or any person identified in the data." *Id.*

By contrast, "inactive" civil investigative data are generally public. *See id.*, subd. 3. Except for the parts of a civil investigative file that are otherwise classified as not public data, inactive civil investigative data are public unless the data's release would jeopardize another pending civil legal action. *Id.* Civil investigative data become inactive upon:

> (1) a decision by the government entity or by the chief attorney acting for the government entity not to pursue the civil action;
>
> (2) expiration of the time to file a complaint under the statute of limitations or agreement applicable to the civil action; or
>
> (3) exhaustion of or expiration of rights of appeal by either party to the civil action.

Id.

Energy Policy contends that the district court erred by denying its motion to compel because the emails are not active civil investigative data under section 13.39, subdivision 2. In the alternative, Energy Policy argues that even if the emails are active civil investigative

data, the district court should have ordered disclosure because the balance of interests under section 13.39, subdivision 2a, favors disclosure. We address each argument in turn.

A. Because the emails are active civil investigative data, the emails are not public.

Energy Policy argues that the district court erred because the emails do not meet the statutory requirements for active civil investigative data and thus are public.[1]

As a threshold matter, we reject Energy Policy's argument that we should consider whether the emails are active or inactive civil investigative data as of the time of our appellate review. To do so would be contrary to the function of appellate review. We are reviewing the district court's decision, and our inquiry is limited to the record before the district court. *See Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 583 (Minn. 1977) ("It is well settled that an appellate court may not base its decision on matters outside the record on appeal, and that matters not produced and received in evidence below may not be considered."); Minn. R. Civ. App. P. 110.01 ("The documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases."). Furthermore, "[u]nless otherwise expressly provided by a particular statute," the data's classification is governed by the time of the request. Minn. Stat. § 13.03, subd. 9; *KSTP-TV v. Metro. Council*, 884 N.W.2d 342, 348 (Minn. 2016) (holding that data

[1] The parties make somewhat different assertions regarding the appropriate standard of review when a district court determines the classification of documents under the MGDPA based in part on its in camera review of the documents. But both parties agree that appellate courts review a district court's legal determinations de novo and its factual determinations for clear error. *See Harlow v. State, Dep't of Hum. Servs.*, 883 N.W.2d 561, 568 (Minn. 2016); *In re Polaris*, 967 N.W.2d 397, 408-09 (Minn. 2021). We do not further analyze the question of the standard of review because it is not necessary to resolve the MGDPA classification question in this case.

are classified when the government receives the request for data). Section 13.39 specifies the circumstances under which civil investigative data become inactive and thus public, but the statute does not instruct this court to classify the data at the time of appellate review. *See* Minn. Stat. § 13.39, subd. 3.

We turn to Energy Policy's arguments that the emails do not constitute active civil investigative data. When determining whether data are active civil investigative data, courts consider whether the data were "(1) data collected by a state agency, (2) as part of an active investigation, (3) undertaken for or in anticipation of a pending civil action." *Westrom v. Minn. Dep't of Lab. & Indus.*, 686 N.W.2d 27, 33-34 (Minn. 2004); *see* Minn. Stat. § 13.39, subd. 2(a). Energy Policy argues that the emails do not qualify as active civil investigative data because they were not "data collected" and were not part of the Attorney General's "active investigation."[2]

First, Energy Policy asserts that the emails were not "data collected" by the Attorney General, citing *St. Peter Herald v. City of St. Peter*, 496 N.W.2d 812 (Minn. 1993). In that case, the Minnesota Supreme Court held that the government must take "affirmative action" to acquire the information for it to be "data collected." *St. Peter Herald*, 496

[2] The Attorney General contends that Energy Policy forfeited its arguments that the emails were not "collected" and that the emails were not "investigative" because, in district court, Energy Policy argued only that any investigation was "inactive." But, because Energy Policy's arguments on appeal are sufficiently related to and consistent with its arguments in district court, the arguments relate to undisputed facts in the record, and the Attorney General substantively responded, we address Energy Policy's arguments on the merits. *See Jacobson v. $55,900 in U.S. Currency*, 728 N.W.2d 510, 523 (Minn. 2007) (concluding that an issue was properly before the court for review when appellant "refined the argument made to the district court" and it was possible "to evaluate [that] argument on facts already present in the record").

N.W.2d at 814. Thus, the data at issue in *St. Peter Herald*—a notice of claim sent by a private attorney to the city—was not "data collected" because the city was "simply a passive recipient of that information." *Id.*

Here, the Attorney General affirmatively joined a multistate coalition with other state attorneys general to engage in litigation related to climate change and entered into a common-interest agreement regarding that work. The emails relate to that litigation effort, and the Attorney General in fact brought lawsuits with those other states. Under these circumstances, the Attorney General was more than a "passive recipient" of the emails and the emails constitute "data collected."

Second, Energy Policy argues that the emails were not collected as "part of an active investigation." We disagree. The Attorney General provided an affidavit stating that the emails related to the "still active consideration of multi-state legal challenges" and included discussions about "potential legal theories on which the actions might proceed." That description is consistent with our in camera review of the unredacted documents and falls squarely within the scope of section 13.39, subdivision 2(a). *Cf. Star Trib. v. Minn. Twins P'ship*, 659 N.W.2d 287, 298 (Minn. App. 2003) ("[T]he principal statutory purpose of Minn. Stat. § 13.39 . . . is to prevent government agencies from being disadvantaged in litigation by having to prematurely disclose their investigative work product to opposing parties and the public."), *rev. denied* (Minn. Feb. 4, 2002). In fact, Energy Policy concedes that the litigation that is the subject of one of the emails remains active.

We are not persuaded by Energy Policy's arguments that the Attorney General must provide additional information to prove that the data were part of an active investigation.

Energy Policy relies on our decision in *Energy Policy Advocates v. Ellison*, 963 N.W.2d 485 (Minn. App. 2021), *rev'd*, 980 N.W.2d 146 (Minn. 2022), to argue that the Attorney General must provide more specific information about the investigations to qualify as active civil investigative data. In that case, we determined that the district court had an inadequate basis for determining that an investigation was active because the Attorney General's descriptions "d[id] not provide sufficient information about the status of the investigations" and the district court did not conduct an in camera review of the data. *Energy Pol'y*, 963 N.W.2d at 497.[3] But here, the Attorney General provided an affidavit indicating the active status of the investigations and both the district court and this court reviewed the documents in camera. Energy Policy has provided no authority suggesting that more is required.

In sum, the district court did not err by determining that the emails were active civil investigative data.

B. The district court did not abuse its discretion by not ordering disclosure of the active civil investigative data.

Energy Policy argues that, even if the emails were active civil investigative data, the district court should have ordered the Attorney General to disclose the emails because disclosure is in the public interest.

[3] In its petition for further review in that case, the Attorney General did not challenge our remand to the district court to review a privilege log and conduct an in camera review to determine whether the documents contained data on an active investigation. *See Energy Pol'y*, 980 N.W.2d at 155 n.2. Thus, the supreme court's opinion reversing this court's decision did not address this portion of our ruling.

Subdivision 2a of section 13.39 provides that a court "may order" that active civil investigative data be disclosed following its in camera review. "In making the determination whether data shall be disclosed, the court shall consider whether *the benefit to the person bringing the action or to the public outweighs any harm to the public, the government entity, or any person identified in the data*." Minn. Stat. § 13.39, subd. 2a (emphasis added). Because the word "may" is permissive, we review the district court's determination for abuse of discretion. *See* Minn. Stat. § 654.44 (2022).

The district court found that the Attorney General would be harmed by disclosing the emails because they contained "legal theories about potential litigation." The district court also found that the emails were not revelatory with respect to Energy Policy's asserted topic of interest—namely, the public's interest in the outside funding of the special assistant attorneys general performing climate-change litigation work in the Office of the Attorney General. Thus, the district court determined that "the benefit to [Energy Policy] and the public would not outweigh the harm to the [Attorney General] in the event of disclosure."

Energy Policy argues that the harm of disclosure did not outweigh the public's interest. We are not persuaded.[4]

[4] Energy Policy supports its arguments that the Attorney General would not be harmed with extra-record information about events that took place after the district court's review. Energy Policy asserts that the litigation that is the subject of one email is now "essentially defunct" because that litigation is currently held in abeyance by the D.C. Circuit. Energy Policy also argues that one state that was part of the multistate coalition and received the emails is now "in direct opposition" to Minnesota with regard to that litigation. Such matters are not properly before this court, and we decline to address them. *See Plowman*, 261 N.W.2d at 583 ("It is well settled that an appellate court may not base its decision on

First, Energy Policy disputes that the Attorney General would be harmed by disclosing the emails because, it argues, policy discussions are not privileged under Minnesota law. But whether policy discussions are privileged is not relevant to the district court's identified harm to the Attorney General. The district court found that the emails contained "legal theories about potential litigation," not policy discussions, and we discern no error in that determination.

Second, Energy Policy asserts that the Attorney General would not be harmed by disclosure because the emails were shared with potentially adverse parties. Specifically, Energy Policy asserts that another state involved in the multistate coalition could become adverse to the coalition if a new state attorney general is elected and adopts a different position. But Energy Policy does not acknowledge that the common-interest agreement requires confidentiality, including if a party left the agreement. And Energy Policy does not contend that the email recipients were adverse at the time the emails were sent, at the time of the data request, or at the time of the district court's review. As a result, the district court did not abuse its discretion by determining that the Attorney General would be harmed by disclosing the emails because they contained legal theories about pending litigation.

Finally, Energy Policy asserts that the district court erred in evaluating the benefit of disclosing the emails. Energy Policy asserts that the benefit of disclosing the emails is the public's interest in the outside funding of the special assistant attorney general

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matters outside the record on appeal, and that matters not produced and received in evidence below may not be considered.").

positions. Based on our in camera review of the unredacted emails, the district court did not err by determining that the emails do not provide insight into that arrangement.

In sum, the district court did not err by determining the data are not public as active civil investigative data and did not abuse its discretion in refusing to order disclosure after considering the harms and benefits of disclosure.[5]

Affirmed.

[5] Because we conclude the Attorney General properly withheld the emails as not public data, we need not address Energy Policy's request for attorney fees. We also note that Energy Policy's request is not properly before this court because it did not file a motion for attorney fees. *See* Minn. R. Civ. App. P. 139.05, subd. 1 ("A party seeking attorneys' fees on appeal shall submit such a request by motion under Rule 127.").